IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1149 of 1995

with

CRIMINAL APPEAL No 917 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

BABU KAVA

Appearance:

1. Criminal Appeal No. 1149 of 1995
   MR BD DESAI APP for appellant
   MS AMEE YAJNIK for Respondent Nos. 1-3
2. Criminal Appeal No. 917 of 1995
   MS AMEE YAJNIK for appellants
   MR BD DESAI APP for Respondent No. 1

CORAM : MR.JUSTICE A.M.KAPADIA
and
MR.JUSTICE H.H.MEHTA

Date of decision: 04/03/2003

COMMON ORAL JUDGEMENT

(Per : MR.JUSTICE A.M.KAPADIA)

1. These two appeals arise out of a judgment and order dated September 18, 1995 rendered by learned Additional City Sessions Judge, (Court No.18), Ahmedabad City in Sessions Case No.114 of 1992 by which the appellants ('accused' for short) of Criminal Appeal No.917 of 1995 came to be convicted of the offences under Sections 304 Part II and 323 read with Section 114 of the Indian Penal Code ('IPC' for short) and A-1 and A-3 were sentenced to suffer R.I. for a period of five years for commission of the offence under Section 304 Part II of the IPC whereas A-2 was sentenced to suffer S.I. for a period of five years for commission of the offence under Section 304 Part II read with Section 114 of the IPC and also S.I. for a period of three months for the offence under Section 323 of the IPC.

2. Criminal Appeal No.1149 of 1995 is filed by the State under the provisions of Section 378 of the Code of Criminal Procedure ('the Code' for short) challenging the acquittal of the accused of the offence under Section 302 of the IPC as according to the State, offence against the accused under Section 302 of the IPC has been duly proved whereas Criminal Appeal No.917 of 1995 is filed by the accused under Section 374 (2) of the Code challenging the order of conviction of the offence under Section 304 Part II as well as Section 323 of the IPC.

3. The basic facts of the case have been detailed in the judgment of the learned Additional Sessions Judge, therefore, it is not expedient for us to repeat the same all over again in verbatim in detail in this judgment. However, the basic facts which are necessary to be discussed in this appeal are that:

3.1. Complainant - Vimlaben and the accused belong to same caste and were doing business of old clothes in Lala Kaka Market, Delhi Darwaja, Ahmedabad since 1991. The complainant's husband deceased Gordhanbhai was from Panchal community (blacksmith) with whom she had an affair and married with him. Prior to the incident, that is, during Navratri festival, two children of A-1 and A-2 (who are husband and wife) had died. At that time the

complainant Vimlaben told them that if they had given treatment their children would have survived. At that time A-1 and A-2 abused the complainant.

3.2. On 10.11.1991 at 1 O' clock A-1 and A-2 came near the house of the complainant. At that time also the complainant told the same thing and thereupon A-1 and A-2 abused the complainant.

3.3. The alleged incident had taken place on 11.11.1991. At that time the complainant and her deceased husband Gordhanbhai came near Lala Kaka Market where the business of old clothes was being carried out. At that time all the accused came there. A-2 told the complainant that she was not concerned with the death of her children and she should not interfere in their affairs. Thereafter A-2 abused the complainant and caught hold of her hair on head and gave fist blow on her chest. At that time the complainant's husband deceased Gordhanbhai came to rescue her. At that time A-1 and A-3 intervened and they gave fist blows to Gordhanbhai. At that time Babuben and Alwain Christian intervened and came to the rescue of the deceased Gordhanbhai. Thereafter accused went away from there. After the alleged incident, deceased Gordhanbhai became unconscious and, therefore, the complainant with the help of intervener took her husband at her home in a rickshaw. Thereafter deceased Gordhanbhai was shifted to emergency ward of V.S. Hospital where he died.

3.4. A complaint for the aforesaid incident was filed by Vimlaben at V.S. Hospital which was transferred to Madhavpura Police Station against the accused for beating her as well as killing her husband by beating him. The complaint was registered as FIR No.I-528/1991 at Madhavpura Police Station. After registering the complaint, investigation was put into motion. Kalavadara PSI took charge of the investigation. He prepared the inquest Panchnama, sent the dead body for autopsy and thereafter transferred the investigation to A.P. Patel, Police Inspector. During the course of the investigation made by A.P. Patel, Police Inspector, clothes and ring of deceased Gordhanbhai were recovered, recorded statements of the witnesses, prepared Panchnama and arrested the accused. He also recorded N.C. complaint No. 722 of 1991 for commission of the offence under sections 323, 504 and 114 of IPC filed by the accused No.3 against deceased Gordhanbhai as well as the complainant Vimlaben. On receipt of the autopsy report, as evidence was divulged against the accused, he filed charge-sheet against the accused for commission of the

offences under sections 302 and 323 read with section 114 of the IPC in the court of learned Metropolitan Magistrate, Ahmedabad.

3.5. On committal, the learned Additional Sessions Judge framed charge at Ex.2 against the accused for commission of the offences under Sections 302 and 323 read with section 114 of IPC. The charge was read over and explained to them and they pleaded not guilty to the same and claimed to be tried.

3.6. To prove the culpability of the accused, the prosecution examined in all seven witnesses and also produced documents upon which heavy reliance was placed.

3.7. The learned trial Judge thereafter recorded further statements of the accused under Section 313 of the Code after the recording of the evidence of the prosecution witnesses was over wherein also they denied the prosecution case and repeated that they are innocent persons. However, they did not lead any evidence nor examine themselves on oath.

3.8. On appreciation, evaluation and analysis of the evidence led by the prosecution witnesses, the learned trial Judge came to the conclusion that the prosecution has proved the alleged incident of beating the deceased by the accused by fist and as a result thereof the deceased died of a homicidal death. He has also recorded the finding that though homicidal death is proved it was not a murder as there was no intention to cause the death of the deceased by the accused. The accused had knowledge when they gave the fist blows that the injury was sufficient in the ordinary course of nature to cause death of the deceased punishable under section 304 Part II of the IPC and, therefore, offence under Section 302 of IPC is not proved but offence under Section 304 Part II of IPC is proved and, therefore, A-1 and A-3 have committed offence under Section 304 part II of IPC whereas A-2 has committed offence under Section 304 Part II and Section 323 read with section 114 of the IPC as she has abetted in committing the offence and also beaten the complainant Vimlaben who has been injured by her and resultantly he passed the order of conviction and sentence to which reference is made in earlier paragraphs of this judgment. It is this finding, ultimate conclusion and resultant order of conviction and sentence which has given rise to the present two appeals one at the instance of the State and the second at the instance of the accused.

4. Mr. B.D. Desai, learned APP who appears for the appellant - State in Criminal Appeal No.1149 of 1995 contended that the order of recording of conviction under Section 304 Part II of the IPC is against the appreciation of evidence as there was ample evidence to show that there was intention as well as knowledge on the part of the accused to kill the deceased. The finding recorded by the learned trial Judge is contrary to the medical evidence as well as the evidence of the eye witnesses. So, according to him, the judgment and order impugned under the appeal deserves to be quashed and set aside by allowing the appeal and thereby holding the accused guilty of offence under Section 302 of IPC and punish them accordingly. He therefore urged to allow the appeal.

5. Ms. Amee Yajnik, learned advocate for the appellants in Criminal Appeal No. 917 of 1995 contended that if the incident as alleged is proved then in that case also as per the settled principle of medical jurisprudence no offence other than one under Section 323 of IPC is proved. According to her, so far as the homicidal death is concerned, it is not proved as there was neither intention nor knowledge on the part of the accused to kill the deceased. In an ordinary quarrel which is frequent in the community to which both the parties belong the accused gave fist blows to the deceased who has died during the course of treatment because of the rupture of spleen and there is ample evidence to show that the deceased was already having diseased spleen as well as the same was enlarged as more in weight and size and, therefore, it was vulnerable, susceptible and was capable of being ruptured in an ordinary stroke. Therefore, the judgment and order which is impugned in this appeal conviction under Section 304 Part II of IPC can never be sustained which is deserved to be quashed and set aside by allowing the appeal. Ms. Yajnik candidly submitted that as the offence under Section 323 of IPC is duly proved and since A-1 and A-3 have already undergone imprisonment of more than 5 years whereas A-2 has already undergone imprisonment for a period of one month and 27 days, same can be treated as substantive sentence for the offence under Section 323 of the IPC. She therefore urged to allow Criminal Appeal No. 917 of 1995 filed by the accused.

6. We have considered the submissions advanced by the learned advocates appearing for the parties. We have also perused the memo of both the appeals, impugned judgment and order, testimonial collections and the record and proceedings which have been called for by this

Court while admitting both these appeals.

7. At the outset be it stated that there is no dispute with regard to the alleged incident as Ms. Yajnik candidly submitted that in view of the oral testimony of the complainant -Vimlaben alleged incident has been proved. It is also not in dispute that the alleged incident took place out of an ordinary quarrel between the complainant and the accused as they belong to the same caste and dealing in the same business.

8. The root cause of the alleged incident was that two children of A-1 and A-2 had died and, therefore, the complainant told A-1 and A-2 that if they had given proper medical treatment their sons would have survived and not died. Thereupon A-1 and A-2 got enraged and started abusing her. On the day of the alleged incident again same talk took place and, therefore, A-2 got excited and out of anger gave fist blows to complainant Vimlaben. Thereupon deceased Gordhanbhai came to rescue her and at that time A-1 and A-3, who are father and husband of A-2 respectively, came there to rescue her and they gave fist blows to deceased Gordhanbhai. At that time, according to the prosecution case, accused A-2 also caught hold of the deceased. As the neighbours intervened all the accused went away from the scene of the offence. Thereafter the deceased became unconscious and with the help of intervener he was first taken to his residence and thereafter shifted for medical treatment to V.S. Hospital where he died. Thereafter complaint for the alleged incident was lodged against the accused and the accused were put to trial.

9. In the aforesaid backdrop of the factual scenario now let us examine the evidence on record.

10. In this connection firstly adverting to the oral testimony of Vimlaben, P.W.2 - Ex.10, she has narrated the story in her examination-in-chief which we have referred to as above. She has further inter alia stated that A-2 had thrown her by giving a push and thereafter gave a fist blow and at that time her husband came to her rescue. Thereafter A-1 and A-3 also came. A-2 caught hold of her hair and A-1 and A-3 gave fist blows on the chest as well as on the abdomen of her husband and thereafter her husband fell down. Thereafter Arvindbhai and Baluben came to rescue her husband. On their arrival the accused went away from that place. Thereafter with the help of intervener her husband was taken to her house and from there he was shifted to V.S. Hospital where he has died.

11. Now on having perusal of the complaint at Ex.24 which was filed by Vimlaben wherein also she has stated the same story which she has stated in the court in her oral evidence. There is no contradiction in her evidence. In view of the aforesaid oral evidence of the complainant and her written complaint at Ex.24 there cannot be any dispute with regard to the alleged incident and therefore Ms. Yajnik has rightly submitted that there cannot be any dispute with regard to the alleged incident and the prosecution has proved the alleged incident.

12. After having held that alleged incident is proved, the next question which is required to be considered is as to whether the deceased died of a homicidal death or died because of rupture of spleen which was enlarged and diseased spleen.

13. In this connection, adverting to the evidence of Dr. Ravindra Shrikrishna Bhise, P.W.4, Ex.25, who has performed the autopsy in a panel of two doctors, has inter alia in his examination in chief testified that weight of the spleen of the deceased was 900 grams measuring 20 cm x 15 cm x 5 cm. According to him, cause of death of the deceased was shock following intraabdominal haemorrhage due to injuries sustained and according to him injury caused to spleen of the deceased in the ordinary course of nature was sufficient to cause death. He has also admitted that the said injury was possible by a blow with a hard and blunt substance or if the spleen came into contact with hard and blunt substance. In cross-examination he has admitted that weight of a healthy spleen varies from 250 grams to 300 grams and pursuant to suffering from malaria, tumor or cancer, the weight of the spleen can be more. It is also testified by him that measurement of healthy spleen is 12.5 cm x 7.5 cm x 2 cm. He has also admitted that while performing autopsy he has not inquired why the weight of spleen of the deceased was more as he did not find it necessary. He has also not inquired whether the deceased was suffering from chronic malaria. He has issued autopsy report at Ex.26 wherein in column 21 it is mentioned that the weight of the spleen is 900 grams, enlarged upto 11 cms below costal margin surrounded by bloodclots, uniformly, grossly, enlarged ruptured spleen; measuring about 20 x 15 x 5 cms in size. Irregularly linear tear present on the gastric surface of the spleen, size 4 x 3 x 2 cms.

14. In view of the aforesaid evidence of Dr.

Ravindra S. Bhise at Ex.25 and autopsy report produced by him at Ex.26 there is no manner of doubt that the deceased was having an enlarged and diseased spleen weighing at least three times more and size was almost double and if this is so we have to decide which offence is proved against the accused, i.e., murder, culpable homicide not amounting to murder, grievous hurt or hurt.

15. As per Modi's Medical Jurisprudence and Toxicology, the normal spleen in an adult measures 12 x 8 x 4 cms. In some cases, the spleen decomposes earlier than the stomach and the intestines, especially if it is swollen and hypepraemic from an acute infectious disease or enlarged from chronic malaria. However, it may resist putrefaction longer, if it happens to be firm and comparatively bloodless. Owing to putrefaction, the spleen becomes soft, pulpy, greenish-steel in colour, and it may be reduced to a diffluent mass within two to three days in summer. On account of its situation, rupture of a normal spleen is very rare unless caused by considerable crushing and grinding force, such as the passing of a carriage or motor car over the body, or by a crush in a railway accident, or by a fall from a very great height; in such cases it is usually associated with injuries to other solid organs and to the ribs overlying the spleen. A normal spleen may sometimes be ruptured by the broken ends of a rib, which may be fractured by a severe kick or by a blow from a blunt weapon. A spleen subjected to traction forces may be torn from its pedicle. An enlarged spleen becomes softened and brittle. Hence it is liable to rupture from a fall or from violence of a very slight degree. In such cases, the abdominal wall may not show any external mark of injury.

16. As per Dr. Jhala & Raju's Medical Jurisprudence, normally the spleen is very high up in the abdomen and well protected by the ribs. Thus, unless enlarged to double its size, it is not directly exposed to external injury. Penetrating injuries can certainly involve the organ. When enlarged, it is clearly vulnerable even to direct blows like kicks. Furthermore, such an enlarged organ is friable in structure and hence likely to bleed profusely. Such profuse bleeding may prove fatal and that too rapidly so. On the other hand when the spleen is of normal size and texture and found to be lacerated, the overlying side and abdominal wall must show signs of blunt injury viz., contusion. A kick on an enlarged spleen resulting in fatal haemorrhage amounts to a milder offence even of simple hurt depending on circumstantial evidence.

17. In view of the above referred to authoritative passages on Science of Medical jurisprudence it cannot be gainsaid that enlarged and diseased spleen itself is sensitive and it is vulnerable and susceptible to rupture by a slightest force. Now, therefore, the question which requires to be considered is as to whether the accused have committed the offence of culpable homicide not amounting to murder punishable under Section 304 Part II of IPC or grievous hurt punishable under Section 325 of the IPC or hurt punishable under Section 323 of the IPC.

18. A similar question arose before the Calcutta High Court way back in 1920 in the case of Emperor v. Saberali Sarkar, AIR 1920 Calcutta 401. In that case, the accused, having found that a young man had approached his kept mistress for the purpose of having sexual intercourse with her, thought that he would be justified in teaching him a lesson by giving him a good thrashing. He accordingly sent for the brother of the young man, and in the presence of the villagers gave him a good beating by kicks and blows, which resulted in his death. The deceased was of a weak constitution and had an enlarged spleen, and it appeared that when the villagers told the accused that he was about to kill the young man by his kicks and blows, he observed that the deceased was merely pretending and gave him some more strokes with a cane. The accused was thereupon charged with an offence under S.304. The jury found him guilty under S.323. The Sessions Judge disagreed with the jury and being of opinion that the accused was guilty under S.325, referred the matter to the High Court under Section 307 of the Old Code. In the aforesaid fact situation, the High Court held that in the circumstances of the case it was doubtful whether the accused had either intended or knew it to be likely that he would cause grievous hurt and as the case seemed to be on the border line between Ss.323 and 325 the accused might be given the benefit of the doubt and should be convicted of an offence under S.323.

19. In the case of Ramakrishna Panicker v. State of Kerala, AIR 1959 Kerala 372, before Kerala High Court the victim was having a spleen of diseased condition which got ruptured. In the said fact situation, Kerala High Court held that when the injury is not serious and there was no intention to cause death or grievous hurt, nor did the accused have knowledge that it was likely to cause grievous hurt or death, he is guilty of causing hurt and not death even though death is caused. It was further held that therefore where from the circumstances of the case it is impossible to draw an inference that the

accused would have intended to give the deceased anything more than a beating or thrashing to teach him a lesson for using foul language to him, a police officer, it would not be possible to attribute to him the requisite intention or knowledge merely because of the diseased condition of the spleen of the deceased which got ruptured. In such circumstances his conviction under S.304 cannot stand.

20. A similar question arose before a Division Bench of Allahabad High Court in the case of Sri Prakash v. The State, 1990 Cr.LJ 486. In that case, the beating given by the accused to a child has resulted into the death of the child. However, there was no visible injuries found on the dead-body. Beating given to the child, therefore, could not be severe. On medical evidence, spleen of the child was found to be ruptured and, therefore, enlarged spleen could only be the reason of death. The accused was not knowing of the enlarged spleen of the deceased. On the fact situation, the Division Bench held that the accused could not be held guilty under Section 304 of IPC and further held that conviction will be proper under Section 323 and not under Section 325 of IPC.

21. Applying the principles laid down by three High Courts in the above referred to judgments and the passages quoted by us from the Medical jurisprudence of Dr. Modi and Dr. Jhala and Raju to the facts of the present case, it cannot escape from the conclusion that the deceased Gordhanbhai died in an ordinary incident which has resulted into quarrel between the complainant and the accused, the accused got excited and gave fist blows to the deceased whose spleen as per the medical evidence was ruptured as it was enlarged and diseased. Therefore neither intention nor knowledge can be attributed to the accused for causing murder or culpable homicide not amounting to murder of deceased Gordhanbhai. At the most the offence under section 323 of IPC is proved as all of them gave fist blows to deceased as well as A-2 has given fist blows to complainant Vimlaben.

22. In aforesaid view of the matter, conviction under section 304 Part II recorded against all the accused cannot be sustained and therefore it deserves to be quashed and set aside by holding that all the accused have committed offence under section 323 of IPC only by giving fist blows to the deceased Gordhanbhai as well as to the complainant Vimlaben. They are, therefore, convicted of the offence punishable under Section 323 of the IPC.

23. So far as the sentence is concerned, A-1 and A-3 have undergone full tenure of sentence of 5 years as imposed by the learned trial Judge for commission of offence under Section 304 Part II of IPC and as per the statement made by Mr. B.D. Desai, learned APP, A-1 Babu Kava Vadakani has been released from jail on 6.6.1998 whereas A-3 Nagin Alias Happu Man Dantaniya has been released from jail on 20.6.1998. The said sentence therefore is treated as substantive sentence for offence under Section 323 of IPC whereas accused No.2 has undergone imprisonment during the period of trial and subsequent to filing of the appeal for a period of one month and 27 days and hence said period is treated as substantive sentence for the offence under Section 323 of IPC. Therefore, no further sentence is required to be imposed upon them. Hence Criminal Appeal No. 917 of 1995 filed by the accused deserves to be allowed in part whereas Criminal appeal No.1149 of 1995 filed by the State deserves to be dismissed.

24. For the foregoing reasons, Criminal Appeal No. 917 of 1995 is allowed in part and accordingly it is partly allowed. Conviction recorded against the accused for the offence under section 304 Part II of the IPC is quashed and set aside. Instead of that they are convicted for commission of offence under section 323 of IPC. The period of sentence already undergone by them is treated as substantive sentence for the offence under Section 323 of the IPC and, therefore, they are not required to be sent in jail. Criminal Appeal No.1149 of 1995 filed by State against the acquittal of accused of the offence under section 302 of IPC is dismissed. Since A-2 is on bail, her bail bond shall stand cancelled and surety is discharged.

(A.M. Kapadia, J.)

(H.H. Mehta, J.)

(karan)